

# European v. National Constitutions

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Articles I-5, I-10 Draco<sup>1</sup>

## IN THE NAME OF THE EUROPEAN CITIZENS

In federal systems public authority is established by the people and exercised for the people at two levels. The treaties establishing the European Union may be conceptualised as the constitution of a supranational public authority, part of a federal system. And what the European Convention has submitted to the European Council to agree upon is an attempt to give this constitution a more coherent, more complete and more appealing form. The new 'Constitution for Europe' will be concluded, formally, by an international treaty. But governments and national parliaments will do this on behalf of the citizens of the Union, and insofar as national Constitutions provide for a referendum, the citizens will directly be involved. This Constitution will, therefore, like national constitutions, draw its legitimacy from the people, citizens of the polity, through their constitutional representatives. Legitimacy obtained is similar to that sought for a regular treaty but specific due to the contents and the explicit constitutional claim of the instrument.

## DISTINCT FROM INTERNATIONAL ORGANISATIONS

What matters even more than on behalf of whom the instrument is brought into effect, however, is its substance. The treaty establishes institutions to which certain legislative, executive and judicial powers are conferred, it organises the election of the people acting for the institutions, the decision-making proce-

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dures and devices for democratic participation and control, it lays down the common values and objectives giving frame and general guidelines for the policies to be led by the institutions, and it determines the rights and obligations of the people who subject themselves to the public authority so constituted in defining their status as citizens of the Union. The result is quite different from an international organisation, at least within a traditional meaning. Though the treaty is concluded by states and gives the Union legal personality and capacity, it establishes such a legal relationship between government and individuals as we know only from (national) Constitutions. There is no international organisation which legislates or takes binding decisions directly applicable for individuals and in which individuals participate directly in the political process, becoming a source of its legitimacy. In no international organisation the questions of democratic control or of fundamental rights have ever been raised the way this has been done for the European Union.

#### THE COMPOSED NATURE OF THE EUROPEAN CONSTITUTION

Even if the European Union has some features of and similarities to a (federal) state, it is not, and it is not intended to be a state. It remains based on its Member States and their constitutions, depending substantially upon the national institutions, procedures and powers, both for its active decision-making and for the implementation of its policies. At the same time it limits national sovereignty and powers in pooling part of their exercise at the European level. As complex as this system may look, in the light of 'multilevel constitutionalism' the European Constitution can be explained as a federal compound consisting of the Constitutions of the Member States, on the one hand, and of the Constitution of the Union on the other. Both constitutional levels are complementary, deeply interwoven, even interdependent. An important change of paradigm in the text of the new Constitution for Europe now takes account of the fact that the same citizens in this composed system are, indeed, the source of legitimacy also of the Constitution for Europe: references to the 'peoples of the Member States' in the existing treaties will be replaced by references to the 'citizens' who are citizens both of the Union and of the Member States: In the Preamble and in the first Article reference is made to the citizens of the Union – apart from those of the States – on behalf of which the Constitution for Europe has been prepared. Article I-19 on the European Parliament and the chapter on the democratic life refers to the European Parliament in which the European citizens (no longer the peoples of the Member States) are represented. Even regarding the European Council and the Council of ministers the citizens are referred to as those who elect the national parliaments to which the ministers shall be

accountable. Article I-46(4) gives the citizens the right to a ‘citizens’ initiative’ where they ‘consider that a legal act of the Union is required for the purpose of implementing the Constitution’. The citizens, thus, in their national and European identity are not only the source of legitimacy for the Union, through the European Parliament and through the Member States as parts of the composed European Constitution. They have also an active role in initiating European policies directly.

#### MULTILEVEL STRUCTURE OF THE EUROPEAN CONSTITUTION

There are other provisions in the new Constitution which confirm the bi- or multilevel structure of the European Constitution. On the one hand, Member States’ national identities ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’ are protected by Article I-5(1). And the principles of Article I-9, in particular the principles of conferral, subsidiarity and proportionality, guide the division of powers and protect the competencies of the Member States. The Member States are deprived, on the other hand, of part of their constitutional autonomy insofar as they are subject to the common principles and values of the Union under Articles 2 and 58. Moreover, Article I-45(2) may be read so as to exclude that a government which, under their respective national constitution is not accountable ‘either to their national parliaments, or to their citizens’ may not represent this Member State in the European Council or the Council of Ministers. Finally, Article I-5(2) requires loyal co-operation, mutual respect and assistance of the Union and its Member States in carrying out their tasks flowing from the Constitution. Under Article I-36(2) the Member States are bound to adopt all measures of national law necessary to implement legally binding Union acts. Both provisions confirm the principle laid down already by Declaration No. 43 to the Treaty of Amsterdam on the Protocol on the application of the principles of subsidiarity and proportionality, that the administrative implementation of European legislation shall generally be a matter for the Member States. Indeed, the Union continues to depend upon the Member States in each case where an act of physical force is needed for the enforcement of its laws and decisions. So, even where the Union has powers to act because action at the European level seems to be more efficient and necessary, the Member States keep the power (and duty) of implementation. This functional power-sharing is a fundamental characteristic of the Union as a composed constitutional system.

## WHO CONFERS COMPETENCIES ON THE UNION ?

The argument made above that, finally, not the Member States but their citizens confer powers on the European Union, powers which may or may not have been vested with the national institutions so far, may be confronted with the wording of Article I-1(1) and Article I-9(2) according to which ‘the Member States confer competences’ to the Union to attain objectives they have in common, or ‘the Union shall act within the limits of the competences conferred to it by the Member States in the Constitution to attain the objectives set out in the Constitution’. Such a wording should not, however, be taken too literally. It is due to the ‘international’ approach taken by a large majority of actors and authors. In democratic systems, however, the state always is supposed to act on behalf of the people. To oppose the state to its citizenry is difficult to uphold in terms of democracy. It should be noted, that the text of the Draft Constitution, indeed, is not consistent anyway: The wording of Article I-11(1) and (2) reflects a more open approach: In explaining the different categories of competencies it begins with the phrase: ‘When the Constitution confers on the Union exclusive competence ...’ or ‘a competence shared with the Member States ...’. If not the states, but the Constitution confers competencies, the actors behind can easily be identified: Those who are finally responsible and legitimise the Union: The European citizens.

## QUESTIONS FOR FURTHER CONSIDERATION

A number of questions can be considered under such premises in a new light:

1. What is the underlying concept of Constitution? If the treaty does not create a European State, is it possible to talk about a Constitution for Europe nevertheless? Does talking about a European Constitution question the idea and legitimacy of national constitutions?
2. How can the status of the European citizen correctly be described – and be distinguished from the concept of nationality of the Member States? Is there a difference of kind or a difference of degree? Should the EU have a say in determining who are its citizens?
3. If the validity and primacy of European law is not derived from the national constitutions but derived – like that of the national constitutions – from the ‘social contract’ among the citizens, could that have implications for the principle of primacy of European law under the new Article I-10?
4. What is the impact of the Constitution for Europe on the national constitutions? Given the implicit modifications national constitutions undergo with every revision of the European treaties – both regarding competencies

- and functions of the national institutions – due to the principle of primacy, is there a need for adapting their wording to constitutional reality?
5. When it becomes clear that the conclusion of the European treaties and their revision are, in fact, acts of constitution-making or -revision affecting both, the European and the national constitutions, is there need to reconsider further the procedure at the European level and the provisions of the national constitutions on the acceptance of such amendments?
  6. If the purpose is not to move towards a federal state but to further develop the European Union under the auspices of multilevel constitutionalism, what are the necessary steps to complete and consolidate this system in terms of transparency, democracy and efficiency?
  7. How can a substantial role of the Member States as the (cultural and political) home of their citizens effectively be preserved against European centralism and intrusion. What is the correct ‘federal balance’ between constitutional autonomy and needs for homogeneity in Europe?

#### LITERATURE

- Armin VON BOGDANDY (Hrsg.), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, Berlin/Heidelberg (Springer) 2003
- Jacqueline DUTHEIL DE LA ROCHÈRE/Ingolf PERNICE, *European Union Law and National Constitutions (general report to FIDE 2002, London)*, in: Mads Andenas/John Usher (eds.), *The Treaty of Nice and Beyond. Enlargement and Constitutional Reform*, Oxford (Hart), 2003
- Ingolf PERNICE, *Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and ‘Multilevel Constitutionalism’*, in: E. Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998, Baden-Baden (Nomos) 1998*, p. 40
- Ingolf PERNICE, *Fondements du droit constitutionnel européen*, Paris (Pédone), 2004
- Matthias RUFFERT, *Schlüsselfragen der Europäischen Verfassung der Zukunft. Grundrechte – Institutionen – Kompetenzen – Ratifizierung*, *Europarecht* 2004, 165
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